Supreme Court, U.S.
FILED
DEC 14 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-930

THE PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

vs.

FREDDIE DALTON
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California

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SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitutional provision involved	2
Statement of the case	2
A. History of the case	2
B. Statement of the facts	4
Reasons for granting the writ	7
Argument	8
Police may lawfully conduct a warrantless search of containers found in a stolen car	8
Conclusion	16

TABLE OF AUTHORITIES CITED

Cases

	Page
Arkansas v. Sanders, 442 U.S. .. (1979) 47 U.S.L.W. 4783, 99 S.Ct. 2575	7, 8, 9, 10, 11, 12, 13
Bell v. Wolfish, .. U.S. .., 47 U.S.L.W. 4507 (1979)	15
Cady v. Dombrowski, 413 U.S. 433 (1973)	9, 10
Cardwell v. Lewis, 417 U.S. 583 (1974)	10, 11
Carroll v. United States, 267 U.S. 132 (1925)	9
Chambers v. Maroney, 399 U.S. 42 (1970)	9, 10, 11
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	11
Cooper v. State of California, 386 U.S. 58 (1967)	9
Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring)	13
Marron v. United States, 275 U.S. 192 (1967)	14
Michigan v. Tyler, 436 U.S. 499 (1978)	15, 16
Mincey v. Arizona, 437 U.S. 385 (1978)	15, 16
People v. Rogers, 21 Cal.3d 542, 579 P.2d 1048, 146 Cal. Rptr. 732 (1978)	9
Rakas v. Illinois, 439 U.S. 128 (1978)	7, 10, 12, 13, 14
South Dakota v. Opperman, 428 U.S. 364 (1976)	10
Stanford v. Texas, 379 U.S. 476 (1965)	14
Texas v. White, 423 U.S. 67 (1975)	9
United States v. Chadwick, 433 U.S. 1 (1977)	8, 10, 11
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	9
United States v. Milhollan, 599 F.2d 518 (3d Cir.), cert. denied, .. U.S. .., 48 U.S.L.W. 3240 (1979)	11, 12
United States v. Ortiz, 422 U.S. 891 (1975)	9

Constitution

United States Constitution: Fourth Amendment	2, 8, 9

Rule

California Rules of Court, Rule 24(a)	1

Statutes

	Page
California Business & Professions Code:	
Section 4143(a)	3
California Health and Safety Code:	
Section 11350	3
Section 11351	2
Section 11377	3
Section 11378	2
California Penal Code:	
Section 31	3
Section 995	3
Section 12020	2
Section 12021	2, 3
Section 12025(a)	2
Section 1538.5	3
California Vehicle Code:	
Section 10851	3
28 U.S.C. Section 1257(3)	2

Text

Warrantless Searches and Seizures of Automobiles, 87 Harv. L.Rev. 835 (1974)	10

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No.

THE PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

VS.

FREDDIE DALTON
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California

---

The Petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California, which was entered in this proceeding on August 16, 1979, and which became final on September 17, 1979 (Rule 24(a), California Rules of Court).

OPINION BELOW

The opinion of the Supreme Court of California, which may be found at 24 Cal.3d 850, 598 P.2d 467, 157 Cal.Rptr. 497 (1979), appears as Appendix A to this petition. The vacated opinion of the California Court of Appeal, First Appellate District, Division Four, appears as Appendix B to this petition.

JURISDICTION

The judgment of the Supreme Court of California became final on September 17, 1979. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the thief of a car has an expectation of privacy in containers found therein so intense as to require police to secure a warrant before they may search those containers.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. History of the Case

By Information No. 93563 filed in the San Francisco Superior Court on December 17, 1976, respondent Freddie Dalton was charged with: (1) possession of a sawed-off shotgun (Cal. Pen. Code § 12020); (2) possession of a concealable firearm by a former felon (§ 12021); (3) possession for sale of amphetamine (Cal. Health and Safety Code § 11378); (4) possession for sale of heroin (§ 11351); (5) possession of a concealable firearm within a vehicle by a former felon (Pen. Code § 12025(a)); and (6) car theft

(Cal. Veh. Code § 10851). It was further charged that respondent was armed with a knife and a handgun at the time of the offenses alleged in Counts 1-4 and 6, and that he had previously been convicted of a felony. Respondent pleaded not guilty to all counts and denied the arming and prior felony allegations on December 28, 1976 (CT 6).[1]

By Information No. 93588 filed in the San Francisco Superior Court on December 21, 1976, respondent was further charged with: (1) possession of heroin (Cal. Health and Safety Code § 11350); (2) possession of methamphetamine (§ 11377); (3) possession of a concealable firearm by former felon (Pen. Code § 12021); (4) possession of a hypodermic needle and hypodermic syringe (Bus. & Prof. Code § 4143(a)); and (5) knowingly giving false information to an officer who was in the performance of his duties (Pen. Code § 31) (CT 7-8). A prior felony conviction was alleged by amendment on December 28, 1976 (CT 9-10).

By Information No. 93630 filed in the San Francisco Superior Court on December 22, 1976, respondent was charged with possession of a concealable firearm by a former felon. The information also alleged a prior felony conviction (CT 11-12).

Respondent's motions to suppress evidence (Cal. Pen. Code § 1538.5) and to dismiss Information No. 93563 (§ 995) were denied by the superior court on January 24, 1977 (CT 34).

On January 27, 1977, respondent withdrew his plea of not guilty to the offenses charged in Information No. 93563 and pleaded guilty to the crimes of possession for sale of

[1] "CT" designates the Clerk's Transcript on Appeal.

heroin (Count 4) and car theft (Count 6). Respondent admitted the prior felony conviction. Upon the motion of the district attorney, the trial court dismissed Counts 1, 2, 3, and 5, and struck the arming allegation (CT 59). Also on January 27, respondent withdrew his plea of not guilty to the offense charged in Information No. 93630 and pleaded guilty to the crime of possession of a concealable firearm by a former felon. The court struck the prior upon the motion of the district attorney (CT 61). Also upon the motion of the district attorney, Information No. 93588 was dismissed in its entirety (CT 60).

On February 17, 1977, respondent was sentenced to state prison for the terms prescribed by law for possession for sale of heroin, car theft, and possession of a concealable weapon by a former felon. The sentences for each offense were to run concurrently (CT 62-63, 65-69).

On April 20, 1978, the California Court of Appeal, First Appellate District, Division Four, affirmed the judgment of convictions. On July 15, 1978, the California Supreme Court granted a hearing and transferred the cause to itself. On August 16, 1979, the supreme court reversed, holding that the challenged warrantless search was unreasonable, and remanded the cause to the trial court. Respondent was given the options of standing on his guilty pleas or withdrawing the pleas and awaiting a refiling by the prosecutor of those charges which could be supported by admissible evidence. The judgment became final on September 17, 1979.

B. Statement of the Facts

The evidence adduced at the preliminary hearing held on Information No. 93563 established that Officer David

Ellis of the California Highway Patrol stopped a white 1966 Cadillac on Highway 280 at about 2:35 p.m. on March 3, 1976 for exceeding the speed limit. The driver of the car, respondent Freddie Dalton, turned off at 25th and Pennsylvania Streets in San Francisco and stepped from the vehicle, armed with two knives in his belt (PHT 3-4, 6).[2] A woman remained in the car. Ellis took one of the knives, not covered by a sheath, from respondent's belt, advised respondent that he had exceeded the speed limit, and asked to see his driver's license (PHT 7). Respondent said that he had no identification and claimed that his name was Woods (PHT 8). The car had no registration papers (PHT 29). Although he said that the woman's name was Marlene, she identified herself as Victoria Arzadon and produced a document bearing that name (PHT 9). Because respondent had no identification and gave a name at variance with that provided by the woman, Officer Ellis radioed for a back-up unit (PHT 9).

Responding to the call was Officer Michael Peterson, whom Officer Ellis told to speak with the female passenger (PHT 18). As Peterson kneeled down at the open door on the driver's side, he saw a gun beneath the arm rest which had been lowered onto the seat (PHT 20). He seized the gun, gave it to Officer Ellis, and asked the woman to step from the car (PHT 21).

California Highway Patrol Officer James Hertogs testified that he arrived at 25th and Pennsylvania Streets in response to Officer Ellis' radio request that the car's VIN number be ascertained. Since the car bore license plates

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[2]"PHT" designates the Preliminary Hearing Transcript.

of another state and was without registration documents, Ellis wanted to investigate the possibility that it had been stolen (PHT 28-29). Hertogs' inspection revealed that the engine and frame numbers were the same, but were different than the number on the doorplate (PHT 29-30). A radio check on the Cadillac provided the information that it might have been stolen in San Francisco in January of 1976 (PHT 31).

By this time the woman, whose real name was Clare Willock, was handcuffed and seated on the curb of the street (PHT 31). Officer Hertogs explained to her that she would be transported to jail because she was under arrest for possessing a firearm in the car. He asked whether she had any belongings in the automobile which she wanted to take with her. She replied that in the trunk were two suitcases and a box of Pampers which she wanted (PHT 32). Seeing that the trunk lock had been "punched," Hertogs opened the trunk by removing the lock cylinder with a screwdriver. His purpose for opening the trunk was to retrieve the items which Willock requested (PHT 33).

In the trunk Officer Hertogs saw a blue suitcase, a box of Pampers, a large metal box, and two shoulder holsters (PHT 33). As only one weapon had been found in the car, Hertogs deduced that a second handgun might be found in the trunk (PHT 34). Beneath the suitcase the officer found an unlocked brown box, inside of which was a disassembled sawed-off shotgun (PHT 34-36). Still looking for a second handgun, Officer Hertogs opened the locked metal box, in which he found narcotics paraphernalia, a bag of white powder, five small packets of brown powder,

five packets of white powder, a .357 caliber revolver, and a weapon of a smaller caliber (PHT 39-44, 66). A second metal box in the trunk contained a packet of balloons of white powder, a scale, blender, and a pestle and mortar (PHT 46-50). During the examination of the trunk, Inspector Hoenisch of the San Francisco Police Department arrived to conduct a field test of the powders found in the vehicle (PHT 45).

It was stipulated that Grace Williams would have testified that she lived at 27 Agnon Avenue in San Francisco on January 12, 1976, when she discovered that her white 1966 Cadillac was missing from her driveway at about 5:30 p.m. The VIN number of the car matched that of the vehicle found in possession of respondent when he was apprehended (PHT 1, 30).

It was further stipulated that the packets contained over 70 grams of amphetamine (PHT 95-97), and over four grams of heroin (PHT 96). In addition, it was stipulated that an expert would testify that the substances had been packaged for future sale (PHT 94).

REASONS FOR GRANTING THE WRIT

This case presents an issue left open by *Rakas v. Illinois*, 439 U.S. 128 (1978); and *Arkansas v. Sanders*, 442 U.S. ....., 47 U.S.L.W. 4783 (1979), to wit: Does the thief of a car have an expectation of privacy in containers placed within so great as to require that police officers obtain a warrant before searching those containers?

The State of California submits that an analysis of the privacy expectations of the owner and thief of an automo-

bile point to the reasonableness of a warrantless search of containers in a car known to be stolen. A thief should be held to know that the inevitable capture of the car will entail a search to determine its ownership and an inspection of any containers to determine their ownership. The owner of the car who has reported it stolen has effectively consented to a search of the vehicle for items of evidentiary significance.

Not only may a thief of a car reasonably expect that a warrantless search be necessary and therefore inevitable, but also procurement of a warrant may often be difficult. Police seizing a suitcase or other container in a stolen car typically will not know what it holds. But the Fourth Amendment requires that the warrant describe with reasonable particularity the thing to be seized. Thus, a magistrate could not lawfully issue a warrant to an officer who did not know what he was looking for in the container.

This case is of nationwide importance because police in all jurisdictions must be informed of the extent to which they may search stolen vehicles. We submit that the search must include any containers found inside the car.

ARGUMENT

POLICE MAY LAWFULLY CONDUCT A WARRANTLESS SEARCH OF CONTAINERS FOUND IN A STOLEN CAR

In its opinion below, the California Supreme Court, relying upon *Arkansas v. Sanders,* 442 U.S. ..... (1979); and *United States v. Chadwick,* 433 U.S. 1 (1977), held that probable cause to believe that a car is stolen does not furnish to police the right to conduct a warrantless search of its containers. The court reasoned that once the containers have been immobilized, there were no exigent circumstances which required an immediate search. The fact that the car was stolen was deemed irrelevant to the analysis. Although the car thief had no protectible interest in the car, he did have such an interest in the containers, which police did not believe were stolen. A person who has placed his personal effects in a stolen car has not waived his right of privacy in their contents. The court therefore held the warrantless search to be unreasonable within the meaning of the Fourth Amendment.

We first state applicable principles. When police stop a car on the street or highway because they have probable cause to believe that it contains contraband or evidence of a crime, they may search it without a warrant. *Arkansas v. Sanders, supra,* 442 U.S. at ....., 99 S.Ct. 2575, 2581; *United States v. Martinez-Fuerte,* 428 U.S. 543, 561-562 (1976); *Texas v. White,* 423 U.S. 67, 68 (1975); *United States v. Ortiz,* 422 U.S. 891, 896 (1975); *Chambers v. Maroney,* 399 U.S. 42, 47-49 (1970); *Carroll v. United States,* 267 U.S. 132, 153 (1925). An automobile which has been stolen is evidence of a crime and, as such, may be searched without a warrant. *See People v. Rogers,* 21 Cal.3d 542, 549, 579 P.2d 1048, 146 Cal.Rptr. 732 (1978).

The search may be conducted on the spot (*Carroll v. United States, supra*), or at the police station garage. *Texas v. White, supra; Chambers v. Maroney, supra; cf. Cady v. Dombrowski,* 413 U.S. 433, 439-448 (1973); *Cooper v. California,* 386 U.S. 58 (1967).

Although some cases have suggested that the warrantless search is necessitated by the exigent circumstances occasioned by the car's mobility (*Arkansas v. Sanders, supra,* 99 S.Ct. at 2591; *Chambers v. Maroney, supra,* 399 U.S. at 49-50), that rationale makes the station house search cases inexplicable despite attempts to reconcile them with the warrantless search rule. *Arkansas v. Sanders, supra,* 99 S.Ct. at 2594 n.14; Note, *Warrantless Searches and Seizures of Automobiles,* 87 Harv.L.Rev. 835, 843-845 (1974). Noting that "warrantless searches of vehicles [have been upheld] in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if nonexistent" (*Cady v. Dombrowski, supra,* 413 U.S. at 441-442), this Court has concluded that a warrantless search is justified by the diminished expectation of privacy which surrounds the automobile: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell v. Lewis,* 417 U.S. 583, 590 (1974) (plurality opinion); *United States v. Chadwick, supra,* 433 U.S. at 12. "Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their exteriors are highly visible; and they are subject to extensive regulation and inspection." *Rakas v. Illinois, supra,* 439 U.S. at 154 n.2 (Powell, J,. concurring). *See also South Dakota v. Opperman,* 428 U.S. 364, 367-368 (1976).

We therefore submit that an officer discovering probable cause to believe that a car has been involved in a crime may conduct a warrantless search of that vehicle if the

detention and search are fortuitous and unforeseeable. *Compare Chambers v. Maroney, supra,* at 51, with *Coolidge v. New Hampshire,* 403 U.S. 443, 471 n.27 (1971) ("we deal here with a planned warrantless seizure"); *see United States v. Milhollan,* 599 F.2d 518, 526 (3d Cir.), *cert. denied,* ..... U.S. ....., 48 U.S.L.W. 3240 (1979); *but see Cardwell v. Lewis, supra,* 417 U.S. at 595-596 (plurality opinion). If the vehicle can be searched on the street, no greater intrusion occurs by (1) the seizure of the car before presenting the probable cause issue to a magistrate; or (2) the removal of the car to the station house, where it is subsequently searched. *Chambers v. Maroney, supra.* In other words, an unplanned search of a car can be conducted without a warrant on the street because of the driver's diminished expectation of privacy; it can also be made at the station house because the removal from the street occasions no greater intrusion than the original search.

The search of containers found in the car apparently presents a separate problem. In *Arkansas v. Sanders, supra,* decided last Term, this Court held "that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 99 S.Ct. at 2594. Probable cause to believe that a suitcase in the trunk of a car contains evidence of a crime is not legally sufficient to authorize a search; the owner's reasonable expectation of privacy requires that a search warrant be secured. *See United States v. Chadwick, supra,* 433 U.S. 1. It has not been decided "whether a warrant is required before opening luggage when the police have probable cause to believe

contraband is located *somewhere* in the vehicle, but when they do *not* know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure." *Arkansas v. Sanders, supra,* 99 S.Ct. at 2595 (Burger, C.J., concurring); *accord, United States v. Milhollan, supra,* 599 F.2d at 527.

Turning to the facts of the present case, the police knew that the car was stolen.[3] They did not, however, have information about the contents of the suitcases and boxes found in the trunk of the car. As was true in *Milhollan,* "the police had probable cause to believe that [the] car, not a particular container in brief contact with [the] car, contained evidence of a crime. Their suspicions were not localized; their search of the automobile was not a pretext for a search of the satchel." 599 F.2d at 527.

We submit that *Rakas v. Illinois, supra,* provides guidance for the disposition of the question whether warrants are required for the search of containers in a stolen car. In *Rakas,* this Court discarded the "rubric of standing," instead holding that the right of a defendant to challenge the legality of a search and seizure is determined by "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment

[3]Although the lower court waived the purported "failure of the officers to articulate the premise [of the stolen nature of the car] at the preliminary hearing" (24 Cal.3d 857; 598 P.2d at 471; 157 Cal.Rptr. at 501), it is clear that the stolen status of the car was, or would have been, the ultimate reason for its search. The police knew that it was stolen; it was seized because it was stolen; it was going to be towed because it was stolen; and it would have been searched at the station because it was stolen. Therefore, the propriety of searching a stolen car was before the lower court and is before this Court.

was designed to protect." 439 U.S. at 140. The interest, or expectation of privacy, "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society." *Id.* at 144 n.12. Despite respondent's ownership of the containers ultimately searched (*see Arkansas v. Sanders, supra,* 99 S.Ct. at 2592 n.8; *Rakas v. Illinois, supra,* 439 U.S. at 142 n.11), we submit that his interest in these containers, voluntarily placed in the stolen car, was not "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

A car thief, or the driver of a car known to be stolen, must be held to realize that the car will probably be discovered by police. Once it is seized, it will also be searched for indicia of ownership (registration and the like), fingerprints, burglar tools, and other items of evidentiary significance. Not only is this search inevitable, it may not be challenged by the thief. *Rakas v. Illinois, supra,* 439 U.S. at 141 n.9. Furthermore, the owner of the car has effectively consented to the search when he has reported the vehicle as stolen.

The next question is what socially acceptable expectation may the thief have with regard to the containers within the car. The ownership of any containers in a stolen vehicle is necessarily unsolved at the time of the seizure. A suitcase or box found in a trunk may belong to the thief, his passenger, the owner of the car, or some other victim. Police should not have to take the word of the thief that the articles were his when an inspection of the contents often can settle the matter.

The lower court characterized the foregoing argument regarding expectations of privacy as "circular." "First, [the State] contends that the car could be searched because [respondent] had no privacy interest in it. Then [the State] contends that [respondent] could have no privacy interest in the car because it would ultimately be searched if he were caught." 24 Cal.3d at 858 n.2; 598 P.2d at 472 n.2; 157 Cal.Rptr. at 502 n.2. The criticism perhaps would be valid if we had argued that *any* search procedure established by the police or the legislature could lawfully diminish privacy expectations. But that was not, and is not, our position. Rather, we submit that the *necessity* for the search, a procedure which should be "recognized and permitted by society," precludes a property interest in the containers "sufficient to establish a legitimate expectation of privacy with respect to particular items located" in the containers. *Rakas v. Illinois, supra,* 439 U.S. at 144 n.12.

There is an additional reason why the search warrant procedure required by the lower court would be unacceptable in most cases of this sort. An officer who finds a suitcase or other container in a stolen car typically will not know what it holds. But the Constitution demands that the warrant describe with reasonable particularity the thing to be seized. *Stanford v. Texas,* 379 U.S. 476, 485-486 (1965); *Marron v. United States,* 275 U.S. 192, 195-198 (1967). A magistrate could not lawfully issue a warrant to an officer who did not know what he was looking for in the container. The officer is left with two alternatives: He can return the suitcase to the thief without examining its contents, surely an irresponsible act; or he can open it to

discover what it contains, the most reasonable course he could follow.

It was suggested in the lower court's opinion that containers in the car could be removed for safekeeping until the vehicle's owner had a chance to identify them. 24 Cal. 3d at 859; 598 P.2d at 472; 157 Cal.Rptr. at 502. But if the owner cannot identify them as his own, it would not follow that they belonged to the thief, for he might have taken them from a third party. Furthermore, if the car's owner is unavailable, the containers may be left unclaimed and unidentified indefinitely. Simply stated, it is reasonable for the police to conduct an immediate search of a stolen car and its contents for indicia of ownership and other items of evidentiary significance.

Finally, we address the lower court's declaration that the reasonable expectation of privacy of a person is not forfeited because police believe that he has committed a crime. 24 Cal.3d at 859; 598 P.2d at 472-473; 157 Cal.Rptr. at 502-503. According to the lower court, our "argument justifies the search not by the officer's belief at the time, but by the fact of [respondent's] subsequent conviction." *Id.* In fact, after receiving the radio report that the car had been stolen, the police had probable cause to believe that respondent had no expectation of privacy in the car or its contents. Police need not wait until conviction to conduct a search because the presumption of innocence has no bearing on the reasonableness of a search. *See Bell v. Wolfish,* ..... U.S. ....., 47 U.S.L.W. 4507, 4510 (1979).

Mincey v. Arizona, 437 U.S. 385, 391 (1978); and *Michigan v. Tyler,* 436 U.S. 499, 506 (1978), cited by the lower

court, are not in point. In neither case was there doubt about the property interest of the defendant in the place that was searched. Mincey rented his apartment, and his arrest for murder did not forfeit his right to privacy in it. Tyler leased the building in which he had started an arson fire, and his arrest did not alter his property right or diminish his expectation of privacy. But when the crime suspected establishes that there may be *no* property right, then the propositions articulated in *Mincey* and *Tyler* have no relevance. In this case, probable cause existed that respondent stole the car; therefore, probable cause existed that he had no property interest and no privacy right in the automobile. Police were entitled to search the car and its contents based on that reasonable suspicion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated: December 6, 1979

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(Appendices Follow)

Appendices

Appendix A

In the Supreme Court of the
State of California

Crim. 20550
(Super. Ct. No. 93563)

The People,
Plaintiff and Respondent,
vs.
Freddie Dalton,
Defendant and Appellant.

[Filed Aug. 16, 1979]

This court must decide whether the warrantless search of closed boxes in the trunk of a car was lawful after the driver was under arrest and handcuffed.

I

Around 2:30 p.m. on March 4, 1976, Officer Ellis of the California Highway Patrol observed a white Cadillac bearing Arizona license plates proceeding about 65 miles per hour southbound on Highway 280. He followed the car a short distance and signalled the driver to stop. The Cadillac left the freeway and stopped.

Appellant, the driver, stepped out of the car. Officer Ellis noticed two knives in his belt. When appellant was unable to produce any identification or vehicle registration, the officer requested and received the driver's license

of appellant's passenger. A backup unit was requested and Officer Peterson arrived three or four minutes later. While questioning the passenger, Officer Peterson saw what he believed to be the butt of a gun wedged between the seat and an armrest that bisected the front seat. The gun was removed. Appellant and his passenger were arrested for carrying a concealed weapon in a vehicle (Pen. Code, § 12025, subd. (a)), and both were placed in handcuffs and seated on the curb until transported to the police station.

The officers radioed for assistance because they suspected the vehicle might be stolen. Officer Hertogs responded. Another officer, who happened to be passing by, also stopped. Officer Hertogs ascertained that the identification number on the engine of the car was the same as the number on the car's frame, but not the same as the number on the car's doorplate. A further check revealed that the vehicle associated with one of those numbers was possibly stolen.

The passenger was informed that she and appellant would be transported to the police station and she was asked if she wanted anything from the car. She requested the suitcase and a box of Pampers. Unable to find them in the passenger compartment, Hertogs was told by the passenger that they were in the car's trunk. He opened the trunk with a screwdriver because the trunk was "punched."

Inside he observed two empty shoulder holsters, two suitcases, a box of Pampers, a large silver colored metal box and various tools. Since only one weapon had been located inside the car, the officer began to search for another weapon to go with the second shoulder holster.

One suitcase and a box of Pampers were removed, and a brown leather box was found beneath the suitcase. On the top was written "Longines, the world's most honored watch." Officer Hertogs opened the box and found a disassembled sawed-off shotgun. Next to the leather box was a silver-gray metal box. Hertogs removed it and opened it with a screwdriver. Inside were plastic bags with a white powder subsequently identified as amphetamine, a small caliber revolver, some small packets containing a brown powder later identified as heroin, and narcotics paraphernalia. The suitcases were also searched, but they contained no contraband.

The highway patrol officers radioed the San Francisco Police Department for assistance and an officer from the narcotics detail arrived. The large metal toolbox was removed from the car and its padlock hammered off. Inside were packets of the white powder, mortar and pestle, a scale, a grinder, and plastic bags. Appellant and his passenger were transported to the police station and charged with possession of controlled substances for sale (Health & Saf. Code, §§ 11378, 11351), auto theft (Veh. Code, § 10851) and various weapon offenses (Pen. Code, §§ 12020, 12021, 12025, subd. (a)).

A motion to suppress was made and denied at the preliminary hearing. Neither appellant nor his codefendant testified. That motion was renewed in superior court based on the transcript of the preliminary hearing. Following its denial, appellant pled guilty to possession of heroin for sale and auto theft.[1] This appeal followed.

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[1] Appellant also pled guilty to a consolidated charge, possession of a concealable firearm by one who has been convicted of a felony. (Pen. Code, § 12021.) That conviction is not involved in this appeal.

II

This court must decide whether a warrantless search may be made in the field of closed personal effects found in the trunk of a car when the car's occupants have been taken into custody.

The Fourth Amendment guarantees individuals privacy in their persons, homes, papers and effects against unreasonable searches and seizures. In addition, it protects against searches conducted without a judicially issued search warrant. As the Supreme Court has recently stated, "In the ordinary case, therefore, a search of private property must be both reasonable and performed pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." (Arkansas v. Sanders (1979) ..... U.S. ....., ... [47 U.S. L.Week 4783, 4785].)

The high court has repeatedly held that warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few carefully circumscribed and jealously guarded exceptions. (Jones v. United States (1958) 357 U.S. 493, 498-499; Katz v. United States (1967) 389 U.S. 347, 357; Mincey v. Arizona (1978) 437 U.S. 385, 390; Arkansas v. Sanders, *supra,* ..... U.S. at p. ..... [47 U.S. L.Week at p. 4785].) If the warrantless search of the boxes found in the trunk of the car is to be upheld, it is the state's burden to show that the search falls within one of those exceptions. (McDonald v. United States (1948) 335 U.S. 451, 456; Badillo v. Superior Court (1956) 46 Cal. 2d 269, 272.)

Respondent contends that neither appellant nor his passenger had any protectible privacy interest in the boxes because they were in the trunk of a stolen automobile. A warrantless search of closed containers found within an automobile involves considerations separate from those involved in a warrantless search of the interior of the automobile, and it must be justified by some recognized exception to the warrant requirement. (Arkansas v. Sanders, *supra,* ..... U.S. at p. ..... [47 U.S. L.Week at p. 4786]; People v. Minjares (1979) 24 Cal.3d 410, 423; see also United States v. Chadwick (1977) 433 U.S. 1, 15.)

The considerations involved in a search of closed personal effects were explored in United States v. Chadwick, *supra,* 433 U.S. 1. In *Chadwick* the Supreme Court held invalid a delayed warrantless search of luggage, believed to contain contraband, which was removed from an automobile. The court noted that at the time of the search the luggage had come under the exclusive control of federal agents since the suspects had been placed in custody. Therefore, the search could not be characterized as incident to an arrest. (*Id.,* at p. 15.)

The court emphasized that individuals have a greater privacy interest in the contents of closed luggage than in the interior of an automobile. It went on to note that luggage is easier to secure while seeking to obtain a warrant than is an automobile. (*Id.,* at p. 13, fn. 7.) *Chadwick* held that once luggage comes under the exclusive control of law enforcement officers, a warrantless search is permissible under the federal Constitution only if both prob-

able cause and actual exigent circumstances are present. (*Id.,* at pp. 15-16.)

In People v. Minjares, *supra,* 24 Cal.3d 410, 423, this court applied the reasoning of *Chadwick* and held that luggage, found in an automobile which was at the stationhouse and in the exclusive control of police, may not be searched without a warrant absent exigent circumstances. Subsequent to this court's decision in *Minjares,* the Supreme Court held in Arkansas v. Sanders, *supra,* ..... U.S. ..... [47 U.S. L.Week 4783] that a warrant is also required to search luggage when it is removed from an automobile in the field. (..... U.S. at p. ..... [47 U.S. L.Week at p. 4786].) Paralleling this court's reasoning in *Minjares,* the Supreme Court in *Sanders* reiterated the distinctions drawn in *Chadwick*—that individuals have a greater privacy interest in closed luggage and that luggage, by its nature, may be more easily reduced to the control of police. "[A]s we noted in *Chadwick,* the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely under their control. See 433 U.S., at 13. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." (..... U.S. at p. ..... [47 U.S. L.Week at p. 4786], fns. omitted.)

Under both *Minjares* and *Sanders,* respondent must show not only that probable cause existed for the search of the boxes in this case, but also that exigent circumstances dictated an immediate search without a warrant. Finally, *Sanders* makes it clear that because a search takes place in the field rather than at the stationhouse does not eliminate the need for a warrant. (See also United States v. Johnson (5th Cir. 1979) 588 F.2d 147, 151; United States v. Stevie (8th Cir. 1978) 582 F.2d 1175, 1179-1180.)

Here, the boxes were discovered in the trunk after appellant and his passenger had been handcuffed and placed under arrest. At that time, four highway patrolmen and four highway patrol cars were on the scene. The boxes were not accessible to appellant or his passenger. At all times after the discovery of the closed boxes, they were under the exclusive control of the officers. Therefore, under *Chadwick* the search cannot be characterized as incident to the arrest. (433 U.S. at p. 15.) Further, the fact that the boxes were found in the trunk of an automobile after the officers legitimately opened the car's trunk cannot validate their later being searched. (People v. Minjares, *supra,* 24 Cal.3d at p. 423.)

In the present case, there were no exigent circumstances that would have dictated an immediate search of the boxes. Appellant and his passenger were safely under arrest. The two metal boxes were closed, and anything that might have been inside was well out of the reach of the handcuffed suspects. Even though no decision had been made as to whether the car should be impounded or towed, the boxes themselves could have been safely transported to the police station. No fears for the officers' safety or threat of destruction of evidence dictated an immediate search. (See People v. Koehn (1972) 25 Cal.App.3d 799, 805.) Further,

it was mid-afternoon on a weekday and a magistrate would have been easily accessible only a short distance away at the Hall of Justice. Since there was no necessity to immediately search the boxes without a warrant, the search which followed was invalid under *Chadwick, Sanders* and *Minjares.*

Respondent further contends that notwithstanding the failure of the officers to articulate the premise at the preliminary hearing, the officer's belief that the car might be stolen provided a legitimate basis for a warrantless search. He argues that officers may properly search a stolen car, and that this search extends to any and all locked containers within that car.

Respondent contends that the officer's belief that a car is stolen provides probable cause to search it under the "automobile" exception of Chambers v. Maroney (1970) 399 U.S. 42, 48-49. This argument misses the point. The suspicion that an automobile may be stolen goes to the issue of the validity of a warrantless search of the automobile itself. Appellant is contesting the *search of the boxes,* not the search of the car. Respondent has never contended that the boxes were stolen, and the officers never testified they had cause to believe they were stolen.

In searching the boxes, the officers testified they were initially looking for appellant's property. Even if the automobile itself could be searched without a warrant under the "automobile" exception, the warrantless search of the boxes must still be justified by some further exigency. (Arkansas v. Sanders, *supra,* ..... U.S. at p. ..... [47 U.S. L.Week at p. 4786]; United States v. Johnson, *supra,* 588

F.2d at p. 151; United States v. Stevie, *supra,* 582 F.2d at pp. 1179-1180.) The belief that the automobile may be stolen provided no exigency dictating an immediate search of the boxes, particularly when the driver was under arrest. If the officers had reason to believe that there was evidence or contraband in the locked containers, the question of probable cause should have been submitted to a magistrate.

Respondent also contends that one who has stolen an automobile may not contest the search of the automobile or of containers found within because he can have no privacy interest in the stolen vehicle. Again respondent misses the point. Even if appellant had no protectible interest in the car, he clearly had a reasonable expectation of privacy in the contents of the boxes. (United States v. Chadwick, *supra,* 433 U.S. at p. 11.) The officers never testified they believed the boxes were stolen. Therefore, appellant could properly contest the search of the boxes.[2] (Cf. Arkansas v. Sanders, *supra,* ..... U.S. at p. ....., fn. 8 [47 U.S. L.Week at p. 4786, fn. 8].)

A second variant of this argument is similarly flawed. It is contended that appellant may not contest the search of the car under the vicarious exclusionary rule because no interest of the owner of the vehicle was violated. (See People v. Solario (1977) 19 Cal.3d 760, 764.) Once again it should be pointed out that appellant is contesting the warrantless search of the boxes, not of the car. He never dis-

[2]Respondent's argument is circular. First, he contends that the car could be searched because appellant had no privacy interest in it. Then he contends that appellant could have no privacy interest in the car because it would ultimately be searched if he were caught.

claimed any interest in the boxes. Thus, the search of the boxes does not involve the vicarious exclusionary rule. (See People v. Martin (1955) 45 Cal.2d 755, 759-761; Kaplan v. Superior Court (1971) 6 Cal.3d 150, 155.)

It cannot be assumed that the owner of the vehicle has no personal effects in the car to which a Fourth Amendment claim might be raised. Although officers are authorized to remove a stolen vehicle from the road and to store it (Veh. Code §§ 22651, subd. (c), 22850), the removal and storage provisions do not authorize a warrantless search of the contents of the vehicle. (Mozzetti v. Superior Court (1971) 4 Cal.3d 669, 707.) Any interest of the owner of the car in possessions left in the car may be adequately protected by noting the presence of any closed containers and removing them for safekeeping or rolling up the windows of the car and locking the doors. (*Id.*, at pp. 707-712.)

If respondent is contending that anyone who places personal effects in an automobile that is stolen has somehow waived his right of privacy in their contents, he has failed to read Mincey v. Arizona, *supra*, 437 U.S. at page 391. In that case the Supreme Court rejected a similar contention that Mincey had forfeited any reasonable expectation of privacy in his apartment by committing a homicide inside. The high court noted that "this reasoning would impermissibly convict the suspect before the evidence against him was gathered." In the present case, the officers were not certain appellant had stolen the Cadillac at the time the boxes were searched. Probable cause is needed for an arrest. However, respondent's argument justifies the search not by the officers' belief at the time, but by the fact of

appellant's subsequent conviction. In rejecting a similar argument in Michigan v. Tyler (1978) 436 U.S. 499, 506, the Supreme Court noted that "a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." Therefore the fact that the automobile was suspected to have been stolen cannot validate the search of the boxes.

Accordingly, this court holds that in the absence of exigent circumstances which require an immediate search, probable cause furnishes sufficient grounds only for a warrantless seizure and immobilization of the closed containers pending the issuance of a search warrant. (See United States v. Chadwick, *supra*, 433 U.S. at p. 15, and Arkansas v. Sanders, *supra*, ... U.S. at p. ..... [47 U.S. L.Week at p. 4785].)

The warrant requirement is not an empty formality. It is the cornerstone of the Fourth Amendment's guarantee of the right to privacy. The assurance that a determination of probable cause will be made by a neutral and detached magistrate rather than an officer under stress in the field is not a minor guarantee. (Johnson v. United States (1948) 333 U.S. 10, 13-14.) The authority of the executing officer and his need to search are carefully reviewed. (United States v. Chadwick, *supra*, 433 U.S. at p. 9.) Limits are imposed on the search through the requirement of particularity. (*Ibid.*) And the factual basis on which the affiant is justifying the search is made in advance of the search itself. This ensures that a search will not be impermissibly justified by what it turns up. (See White, *The Fourth Amendment as a Way of Talking About People: A Study*

of Robinson and Matlock (1974) Sup.Ct.Rev. 165, 181, fn. 34.) These important protections would be undermined by the adoption of a rule that would encourage officers to conduct a search at the time of the seizure of personal effects, rather than requiring them to obtain a warrant. (See United States v. Schleis (1978) 582 F.2d 1166, 1172; United States v. Johnson, *supra*, 588 F.2d at p. 151.)

Since the officers failed to obtain a warrant to search the closed boxes found in the trunk of the car, appellant's motion to suppress the evidence found in the boxes should have been granted. Accordingly, appellant should be allowed the election of standing on his guilty pleas or withdrawing the pleas and awaiting a refiling by the prosecutor of those charges which can be supported by admissible evidence. (See People v. Hill (1974) 12 Cal.3d 731, 767-770.) The trial court is directed that upon any appropriate motion filed by appellant within 30 days after this decision becomes final, it should vacate the guilty pleas entered by appellant and reinstate those charges requested by the prosecutor. If no such motion is filed by appellant, the trial court is directed to reinstate the original judgments. (*Id.*, at pp. 769-770.)

Bird, C.J.

We concur:

Tobriner, J.
Mosk, J.
Richardson, J.
Manuel, J.
Newman, J.

Concurring Opinion by Clark, J.

I concur under the compulsion of Arkansas v. Sanders (20 June 1979) ..... U.S. .....*

Clark, J.

*Advance Report Citation: 47 U.S. L.Week 4783.

Appendix B

In the Court of Appeal of the State of California
First Appellate District, Division Four

1/Crim. 16645
(Superior Court No. 93563)

The People,
Plaintiff and Respondent,
vs.
Freddie Dalton,
Defendant and Appellant.

Freddie Dalton appeals from a judgment by which concurrent terms of imprisonment were imposed after he pleaded guilty to possession for sale of heroin (Health & Saf. Code, § 11351), car theft (Veh. Code, § 10851) and possession of a concealable firearm by a felon (Pen. Code, § 12021).

The appeal tests the propriety of orders which the court had made denying appellant's motions to suppress evidence (Pen. Code, § 1538.5) and to set aside one information (Pen. Code, § 995). The motion to suppress evidence was submitted on the preliminary hearing transcript. The following narrative is derived from that transcript.

A highway patrolman stopped appellant for exceeding the speed limit. Appellant stepped out of the car and the officer saw that appellant was wearing two knives on his

belt. Appellant had no identification and could produce no registration papers for the car. Other officers came up to help. One of them saw in the car the butt and back part of an automatic weapon; the weapon was seized. Because the car had out-of-state license plates and no registration papers, the officers checked the vehicle identification number and were informed by radio that the car was possibly one that had been stolen in San Francisco about two months earlier.

Appellant and his passenger were both arrested for possession of the automatic weapon. An officer informed the passenger that she would be taken to jail for booking, and asked whether she had belongings in the car which she wanted to take along. She asked the officer to get some items out of the trunk of the car. He opened the trunk for that purpose and saw, among miscellaneous luggage and other equipment, two shoulder holsters. The officer then began looking for more firearms. He found a sawed-off shotgun, two revolvers, narcotics paraphernalia and packaging equipment, amphetamine and heroin.

The vehicle had in fact been stolen.

Appellant contends that the search of the vehicle was unlawful. This contention is entirely without merit. It was proper for the officer to stop the vehicle for speeding. When preliminary inquiries produced indications that the vehicle might have been stolen, it was proper to investigate that possibility. It was proper to look for vehicle identification numbers under the circumstances. (*People v. Davitt* (1976) 56 Cal.App.3d 845.) When in the course of that inspection an automatic weapon was discovered, it was proper to seize the weapon and arrest the occupants of the car.

Appellant contends that the request of the passenger that the officer remove her personal effects from the trunk did not justify an entry. That contention cannot be sustained; the passenger acted within her rights in asking the officer to assist in reclaiming her property. Once the trunk was opened and the officer saw two shoulder holsters, he was justified in making a thorough search for additional firearms. (Cf. *People v. Hill* (1974) 12 Cal.3d 731, 751.)

United States v. Chadwick (1977) 433 U.S. 1 (53 L.Ed. 2d 538), cited by appellant, is to be distinguished. There the United States Supreme Court held that a warrant was required to authorize search of a footlocker which had been taken, pursuant to lawful arrests, from the trunk of a car. But the footlocker had been taken by federal agents to the federal building and was opened there more than an hour after the arrests. Here, in contrast, the packages were opened shortly after the arrests, while everyone was still by the vehicle, and while the officers were reasonably searching for more firearms and for evidence.

The judgment is affirmed.

Christian, J.

We concur:
Caldecott, P. J.
Rattigan, J.